APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 13, 2001 Decided June 19, 2001

No. 00-1318

FLORENCE SNOWDEN,
PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,
RESPONDENTS

On Petition for Review of an Order of the
Benefits Review Board

Richard W. Galiher, Jr. argued the cause and filed the briefs for petitioner.

Joshua T. Gillelan, II, Senior Attorney, argued the cause for respondent Director, Office of Workers' Compensation Programs. With him on the brief was *Carol A. De Deo*, Associate Solicitor.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Roger S. Mackey argued the cause and filed the brief for respondents Washington Hospital Center and Travelers Property Casualty Company.

Before: WILLIAMS, GINSBURG AND ROGERS, *Circuit Judges.*

ROGERS, *Circuit Judge*: This case is one of the last claims likely to be brought by a District of Columbia employee under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994).[1] Florence Snowden appeals an order of the Benefits Review Board of the United States Department of Labor overturning a supplementary compensation order of the Office of Workers' Compensation Programs. The underlying controversy is whether Ms. Snowden's compensation rate should include annual cost of living adjustments under § 910(f) of the Act for the years between her 1978 injury and the 1990 classification of her disability as permanent and total. The only question the court reaches, however, is whether the Board erred in asserting jurisdiction to review the supplementary compensation order. We join the other circuits that have addressed this question in holding that the Board lacked jurisdiction to review the order because it was issued pursuant to § 918(a), and thus became final when issued, with relief available only from the district court. Accordingly, we vacate the November 15, 1999 decision and order of the Board.

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[1] The Longshore and Harbor Workers' Compensation Act applies to injuries suffered by private-sector workers in the District of Columbia before July 24, 1982. Thereafter, the District of Columbia Workers' Compensation Act of 1979, D.C. Code § 36-301 to 36-345 (1981), applies. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 204, 302, 404, 87 Stat. 774, 783-84, 787-88 (1973). Because Ms. Snowden's injury occurred in 1978, we refer to the Longshore and Harbor Workers' Compensation Act as it applies in the District of Columbia as "the Act."

I.

Florence Snowden injured her back in 1978 while working as a psychiatric nurse at the Washington Hospital Center.[2] After a formal hearing, an Administrative Law Judge issued a compensation order in 1992 awarding her benefits under the Act for permanent total disability, "commencing December 18, 1990 and continuing for a period of 104 weeks thereafter, including periodic increases to which she may be entitled under the Act." Both the Office of Workers' Compensation Programs ("OWCP") and Aetna appealed to the Benefits Review Board; OWCP appealed the award of § 908(f)[3] relief to Aetna, while Aetna challenged the determination of permanent total disability. The Benefits Review Board affirmed the award of compensation but remanded the claim for § 908(f) relief.[4]

The 1992 compensation order did not specify the manner in which Ms. Snowden's benefit payments were to be calculated. Rather, the order simply stated that Aetna must "pay all periodic permanent total disability benefits . . .

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[2] For ease of reference, we refer to Ms. Snowden's employer, the Washington Hospital Center, and its insurer, Aetna Casualty & Surety Company (now known as Travelers Insurance Company) as "Aetna." We also refer to "OWCP," the Office of Workers' Compensation Programs, without distinguishing between actions taken by various officials in or on behalf of OWCP.

[3] Pursuant to § 908(f), the Special Fund, established in 33 U.S.C. § 944, will assume responsibility for permanent total disability payments after 104 weeks if "the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury . . . ." 33 U.S.C. § 908(f)(1).

[4] On remand, the Administrative Law Judge ruled that § 908(f) was inapplicable and denied Aetna's request for reconsideration. The Board affirmed on Aetna's second appeal. Aetna thereafter reimbursed the Special Fund for payments it had made to Ms. Snowden since December 1992 and reinstated payments at rates that included catch-up adjustments.

including periodic increases to which she may be entitled under the Act." Thus, the order did not explicitly state whether Ms. Snowden's compensation rate should reflect the annual cost of living adjustments under § 910(f), i.e., the "catch-up" adjustments, that had accrued in the years between her injury and the classification of her injury as a permanent and total disability.[5] Consistent with *Brandt v. Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986), OWCP advised Aetna that Ms. Snowden's weekly compensation rate would increase from the $192.80 that she had received for temporary total disability to $357.80 for permanent total disability, a figure reflecting the § 910(f) catch-up adjustments compounded since her 1978 injury. Aetna paid Ms. Snowden as OWCP instructed.

Aetna did not challenge OWCP's methodology for computing Ms. Snowden's benefit payments until June 11, 1998. Then, relying on the Board's recent decision *in Bailey v. Pepperidge Farm, Inc.*, BRB No. 97-1156, 1998 WL 285563 (Benefits Review Bd. May 19, 1998), Aetna unilaterally cut Ms. Snowden's weekly benefit payments by nearly half, from $438.00 to $236.00, and requested an order from OWCP allowing it to take a credit under § 914(j) for $76,626.31 in

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[5] Under § 910, "Determination of Pay," subsection (f) provides that cost of living adjustments to compensation benefits are available only to those claimants whose disability is classified by OWCP as permanent and total. *See* 33 U.S.C. § 910(f).

alleged overpayments.[6] Ms. Snowden filed a claim under § 914(f)[7] for additional compensation for overdue installments based on Aetna's failure to pay in accord with *Brandt/Holliday*. OWCP issued a "supplementary compensation order" in 1998, finding Aetna in violation for failure to make more than $3500 in benefit payments, and liable, therefore, under § 914(f) for a penalty equal to 20% of the shortfall. Aetna paid Ms. Snowden

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[6] In *Brandt*, 785 F.2d at 332, this court adopted the interpreta tion of § 910(f) set forth in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 417, 422 (5th Cir. 1981), whereby § 910(f) catch-up adjustments were retroactive to the date of injury. In this opinion, we refer to "*Brandt/Holliday*" as the rule that applied when OWCP issued Ms. Snowden's 1992 compensation order. In 1990, the Fifth Circuit, sitting en banc, overruled *Holliday*. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990). Some years later, in 1998, the Board held in *Bailey* that *Brandt/Holliday* "no longer applies to cases arising under the [ ] Act." *Bailey*, 1998 WL 285563, at *4. Henceforth, catch-up benefits under § 910(f) would no longer be retroactive to the date of injury but would apply only to periods after an injury was classified by OWCP as permanent and total. *See id.* In contrast to the request made by Aetna for a credit reimbursement, no retroactive adjustment arose in *Bailey*, 1998 WL 285563, at *1-*4, because the employer had never commenced paying at the retroactive catch-up rate, and in *Phillips*, 895 F.2d at 1035-36, the employer and the Board agreed not to seek reimbursement from the claimant.

[7] Section 914(f), "Additional Compensation for Overdue Installment Payments Payable Under Terms of Award," provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. § 914(f).

the past-due benefits but not the 20% penalty.[8] Aetna then appealed the supplementary compensation order to the Benefits Review Board.

The Board reversed OWCP's award of catch-up adjustments in the 1998 supplementary compensation order, while noting that because the penalty had not been paid, it "lack[ed] jurisdiction to address the propriety of the penalty." On reconsideration, the Board rejected OWCP's argument that the Board lacked jurisdiction because the 1998 supplementary compensation order was issued pursuant to § 918(a), and thus was subject only to review by the district court. The Board took the position that there had never been a formal determination in the 1992 compensation order that Ms. Snowden was entitled to § 910(f) catch-up adjustments retroactive to the date of her injury, and thus the alleged default of the catch-up adjustments was not "compensation due under any award of compensation" pursuant to § 918(a). In the Board's view, the 1998 supplementary compensation order was "an original adjudication of the *Brandt/Holliday* issue which is subject to review by the Board." The Board also ruled that Aetna would not receive credit for catch-up adjustments made prior to the *Bailey* decision but would be entitled to reduce Ms. Snowden's payments subsequent to *Bailey* so as to recover the amount of *Brandt/Holliday* overpayments.

II.

As a threshold matter, Ms. Snowden, joined by OWCP, contends that the Benefits Review Board lacked jurisdiction to review the 1998 supplementary compensation order because the order was issued under § 918(a), not § 921(a).

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[8] After Ms. Snowden filed for a default under § 918(a), OWCP issued a second supplementary compensation order in 1999 declaring the 20% penalty in default.

Our review of decisions and orders of the Benefits Review Board is for errors of law and for confirmation that the Board acted within the scope of its review in evaluating the decision of the administrative law judge. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 293 (D.C. Cir. 1990) (citing *Stark v. Washington Star Co.*, 833 F.2d 1025, 1027 (D.C. Cir. 1987); *Stevenson v. Linens of the Week*, 688 F.2d 93, 96-97 (D.C. Cir. 1982); *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979)). The Board does not make policy; "its interpretation of the [Act] thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (citing *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 94 (D.C. Cir. 1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 n.5 (7th Cir. 1979)). We hold that the Board lacked the jurisdiction to review the 1998 supplementary compensation order because it was a final order unreviewable by the Board.

The Act provides for review of compensation orders in two principal ways. Section 921 provides generally for the review of compensation orders by the Board.[9] Specifically, § 921(a)

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[9] Section 921, "Review of Compensation Orders," provides in subsection (b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

33 U.S.C. § 921(b)(3).

provides that a compensation order shall become "effective" upon its filing pursuant to § 919, "unless proceedings for the suspension or setting aside [the] order are instituted" within thirty days. 33 U.S.C. § 921(a). Until that time, the Board has jurisdiction to "determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees. . . ." *Id.* § 921(b)(3). In contrast, § 918(a) addresses the collection of defaulted payments under an award of compensation.[10] Thus, where an employer has failed to make payment for thirty days after a payment is due under a compensation award, the claimant may file for a supplementary order declaring the amount in default;

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[10] Section 918, "Collection of Defaulted Payments; Special Fund," provides in subsection (a):

> In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. . . . The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. . . . Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. . . .

33 U.S.C. § 918(a) (footnote omitted).

the supplementary order becomes "final" when issued. *Id.* § 918(a). Review is not available by the Board, but only in an enforcement proceeding in the district court. *See id.* The Ninth Circuit has described the three prime distinctions between § 918 orders and § 921 orders:

> (1) [O]rders issued under § 918, unlike § 921 orders, are not appealable to the Board; (2) § 918 orders are final when issued unlike § 921 orders which do not become final until after 30 days or, if appealed, after appeal; and (3) as a result, § 918 supplementary orders can immediately be filed with the federal district court for enforcement.

Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1385 (9th Cir. 1985). OWCP maintains that "finality" under § 918(a) means that "such an order is not subject to the ordinary review process of § [9]21, at least where the amount declared in default has not been paid in full, because such review would be duplicative of that available from the district court."

As other circuits have observed, the Longshore and Harbor Workers' Compensation Act is "explicitly designed to encourage the prompt payment by employers of obligations under a compensation order notwithstanding the existence of an appeal." *Id.* at 1384. Thus, the Fifth Circuit stated that where employers fail to meet their obligations, § 918(a) "provides a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards, a theme central to the spirit, intent, and purposes of the [Act]." *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir. 1983). With that statutory purpose in mind, it follows that a § 914 order and a § 918 standard default order differ only in immaterial ways; under the former, OWCP must compute the 20% penalty amount that should be added to the default amount. An order issued under § 914(f) thus "is nothing more than a standard

default order, plus an additional arithmetic computation." *Providence*, 765 F.2d at 1386. Because § 914 directs that both the default amount and the penalty amount be paid at the same time, the terms of the statute explicitly reject any distinction between § 918 awards of "existing compensation" and § 914(f) awards of "additional compensation." *Id.* Both awards are "based on an appealable prior compensation order that resolves the substantive rights of the parties." *Id.*

Both the statute and caselaw indicate that whether the award of additional compensation for overdue installments and the declaration of the default are separately issued orders or combined into a single supplementary order is irrelevant. *See id.* at 1385; *Tidelands*, 719 F.2d at 128-29 & 128 n.3. In *Tidelands*, when the employer failed to pay the § 914(f) penalty due within thirty days after the filing of the award, OWCP issued a supplementary compensation order, finding the employer in default of the penalty under § 914(f). *See Tidelands*, 719 F.2d at 128 & n.3. The Fifth Circuit held that the second order was not a § 914(f) order because the clear "substance [of] the order was a 'supplementary order declaring the amount of the default' within the meaning of Section [9]18(a) of the [Act]...." *Id.* at 128 n.3. In *Providence*, the supplementary compensation order awarding a 20% penalty and the supplementary compensation order declaring default of the 20% penalty were combined into a single supplementary compensation order. *See Providence*, 765 F.2d at 1385. The Ninth Circuit adopted the Fifth Circuit's approach, observing that were the § 914(f) supplementary order "subject to § 921 procedures, it would be far more difficult and cumbersome for a claimant to collect both awards at the same time," as the Act contemplates. *Id.* at 1386. For, as the Ninth Circuit noted, the default amount would be immediately collectible, while the 20% penalty could be collected only after waiting for the expiration of the 30-day review period under § 921 and then

obtaining from OWCP a second supplementary order under § 918 declaring the first supplementary order in default. *See id.* The latter scheme, the court concluded, "is obviously needlessly duplicative and time consuming and completely at variance with Congress' intent," *id.* (citing *Tidelands*, 719 F.2d at 129), namely, to provide "a quick and streamlined mechanism for the collection of compensation under the [Act]." *Id.*

Consequently, "notwithstanding the general grant of jurisdiction to the Benefits Review Board contained in 33 U.S.C. § 921(b)(3)," the circuits to address the issue have concluded that "actions for the enforcement of orders declaring default in the payment of [installments] due under either § 914(f) or any other substantive section of the [Longshore and Harbor Workers' Compensation Act] are to be brought in the district court and, only subsequent thereto, by appeal to the appropriate court of appeals." *Tidelands*, 719 F.2d at 129; *see also Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 907 (3d Cir. 1994); *Providence*, 765 F.2d at 1386. We agree, for reasons set forth by the Fifth and Ninth Circuits, that such an interpretation is consistent with the statutory language and "far better" conforms to Congressional intent. *Providence*, 765 F.2d at 1386.

The 1998 supplementary compensation order was sought by Ms. Snowden pursuant to § 914(f) and resulted in OWCP's issuance of a supplementary order declaring Aetna in default of paying installments due under the 1992 compensation order. *See supra* n.8. As such, the 1998 order was manifestly an order for the collection of defaulted payments within the meaning of § 918(a). As OWCP states, the 1992 compensation order was "plainly premised on th[e] view" that *Brandt/Holliday* applied to all awards for permanent total disability under the Act, and "on the consequent proposition that the compensation [ ] calculated and declared in default was 'due under' the [1992

compensation order]." Respondent's Brief at 15. The Board's characterization of the 1998 supplementary compensation order as "an original adjudication of the *Brandt/Holliday* issue" ignores both this circuit's law at the time the 1992 compensation order was issued and OWCP's contemporaneous understanding of the compensation rate for permanent total disability benefits in the District of Columbia. The Board's interpretation would also mean delays in receipt of amounts due to claimants contrary to the purposes of the Act and the specific provisions of § 918 to ensure quick payment of defaulted amounts. *See Providence*, 765 F.2d at 1386.

Essentially then, the Board failed to acknowledge the distinction between appeals of compensation orders and proceedings relating to compensation orders that are not direct appeals of the underlying compensation orders, but are "application[s] for a supplementary order declaring a default in the payment of compensation under § [9]18(a). . . ." *Bray v. Director, OWCP*, 664 F.2d 1045, 1047 (5th Cir. 1981). "Such a deficiency is distinct from an error of fact or law, which must be asserted within 30 days after the filing of a compensation order." *Id.* (citing § 921(a)). Given the undisputed record that Aetna paid Ms. Snowden pursuant to the 1992 compensation order on the basis that she was entitled to the benefit of the catch-up adjustments, the fact that § 910(f) was not explicitly mentioned in the 1992 compensation order is not dispositive of the jurisdictional issue. The reference was implicit in light of *Brandt/Holliday*, and for years Aetna paid without challenging OWCP's methodology for calculating Ms. Snowden's compensation rate. When Aetna did challenge the methodology, it relied on the Board's decision in *Bailey*, which acknowledged a change of law in ruling that the *Brandt/Holliday* rule "no longer applies to cases arising under the [ ] Act." *Bailey*, 1998 WL 285563, at *4.

Finally, although Ms. Snowden and OWCP ask the court to address whether *Brandt/Holliday* is still law in this circuit, we decline to do so in view of our holding that the Board lacked jurisdiction to review the supplementary compensation order. Once the court has determined that the agency did not have jurisdiction to act, the court has declined to consider the merits of contentions that the agency erred. *See, e.g., Stoddard v. Board of Governors of the Fed. Reserve Sys.*, 868 F.2d 1308, 1312 (D.C. Cir. 1989); *see also Synovus Fin. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 428 (D.C. Cir. 1991); *Seatrain Lines, Inc. v. Federal Maritime Comm'n*, 460 F.2d 932, 949 (D.C. Cir. 1972), *aff'd*, 411 U.S. 726 (1973). In view of our practice, which is binding absent *en banc* review, the court has no occasion to decide whether it has jurisdiction to reach the substantive contentions. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).[11]

Accordingly, because the Benefits Review Board lacked jurisdiction to review the 1998 supplementary compensation order issued pursuant to § 918(a), we vacate the November 15, 1999 decision and order of the Board.

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[11] The court, therefore, also does not reach Ms. Snowden's contentions that any modification to *Brandt/Holliday* be prospective, and that the Board erred in ruling that the lower compensation rates should be applied as of the date of *Bailey*. The court likewise does not reach OWCP's contentions that the Board misread *Brandt*, that this court should overrule *Brandt*, and that, in any event, Aetna waived any objection to the application of *Brandt* by failing timely to raise its objection.

APPENDIX B

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 99-0245

Not-Published

Florence Snowden Claimant-Respondent	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company (now known as Travelers Property Casualty)	)	Date Issued: June 30, 2000
Employer/Carrier-Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Party-in-Interest	)	Decision and Order on Reconsideration

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act of Charles L. Green, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Richard W. Galiher, Jr. (Galiher, Clarke & Galiher), Rockville, Maryland, for claimant.

Roger S. Mackey, Chantilly, Virginia, for employer/carrier.

Joshua T. Gillelan II (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), have filed timely motions for reconsideration of the Board's November 15, 1999, decision in the captioned case, wherein the Board reversed the district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). 20 C.F.R. §802.407. Employer responds, urging the rejection of these motions. For the reasons discussed below, we deny the motions for reconsideration.[1]

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[1] As a result of errors in service by the parties, the Board did not receive briefs from either claimant or the Director prior to its initial decision in this case. In order to rectify any error in this regard, we will discuss each argument raised by these parties on reconsideration.

To recapitulate the relevant facts in this case, claimant sustained a back injury while working as a psychiatric nurse for employer on September 7, 1978. On March 18, 1992, Administrative Law Judge Charles P. Rippey awarded claimant continuing permanent total disability benefits from December 18, 1990, medical benefits, and interest, as well as any periodic increases to which claimant may be entitled under the Act.[2] The administrative law judge's decision however did not set the compensation rate, and, in particular did not order that cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), be paid in accordance with the *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986), and *Holliday* decisions.

Acting on claimant's claim for an assessment of additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f), the district director, by Order dated October 16, 1998, formally set out, for the first time, a determination that the compensation rate is to include annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[3] He therefore concluded, based on his finding that employer was not making disability payments at the proper rate, that employer was in default in the compensation owed claimant in the amount of $3,580.68. In addition, the district director held employer liable for a penalty

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[2] Employer's request for Section 8(f) relief, 33 U.S.C. §908(f), was ultimately denied by the administrative law judge and that denial was affirmed by the Board. *Snowden v. Washington Hospital Center*, BRB No. 95-2125 (Dec. 9, 1996)(unpub.).

[3] In *Holliday*, the United States Court of Appeals for the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747.

of 20 percent of the amount in default ($716.14) pursuant to Section 14(f).

On appeal, the Board held that, in accordance with *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she became permanently totally disabled. Accordingly, the district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday* was reversed. *Snowden,* slip op. at 4.

In his motion for reconsideration, the Director asserts that the district director's order for which review was sought was a "Supplementary Compensation Order" entered pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a), which is reviewable only by a district court and thus is not within the jurisdiction of the Board under Section 21 of the Act, 33 U.S.C. §921. The Director therefore requests that the Board now dismiss employer's appeal for lack of jurisdiction. The Director further contends that if the Board did have jurisdiction over employer's appeal, the law of the case doctrine precludes application of the Board's decision in *Bailey.* The Director avers that employer herein accepted the administrative view regarding *Brandt,* embodied in the district director's calculation worksheet dated April 27, 1992,[4] after the administrative law judge's award was originally filed, and again when the continuing liability for permanent total disability reverted to it

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[4] In this regard, the Director also argues that the Board's prior decision is in error because it did not have the complete administrative file before it. He has, on reconsideration, provided the Board with more documents, including the district director's calculation worksheet and correspondence between the parties regarding employer's obligation under *Holliday.* While these additional documents indicate that employer initially paid benefits, without protest, under *Holliday,* they have no dispositive impact on the Board's ability to render a decision in this case.

upon the denial of Section 8(f) relief; thus, the Director maintains that employer did not raise the applicability of *Brandt/Holliday* in a timely fashion. Moreover, the Director argues that the Board's decision in *Ryan v. Lane & Co.*, 28 BRBS 132 (1994), supports its position in the instant case. Lastly, the Director urges the Board to revisit its decision in *Bailey* and recognize that *Brandt* is still controlling law in D.C. Act cases. For the most part, claimant's contentions on reconsideration mirror those raised by the Director. Claimant, however, also argues that if *Bailey* is applicable to this case, it must be read so as to allow employer to adjust benefits only in a prospective manner.

In *Bailey,* the employer had voluntarily paid the claimant temporary total disability benefits since 1982, and paid the claimant permanent total disability benefits in accordance with an administrative law judge's 1992 award. In 1996, a dispute arose between the employer and the district director concerning Section 10(f) adjustments. After various correspondence over the next year, the district director ultimately issued an order holding employer liable for a Section 14(f) penalty for failure to pay claimant at a rate inclusive of Section 10(f) adjustments calculated pursuant to *Holliday.* Employer timely appealed this order to the Board. The Board held that due process required that it address the Section 10(f) issue raised by employer as employer's appeal presented its first opportunity to challenge the computation of the cost-of-living adjustment pursuant to *Holliday. Bailey,* 32 BRBS at 77. The administrative law judge had not ordered that Section 10(f) adjustments be calculated pursuant to *Holliday,* and the district director had not issued any prior orders addressing the issue. The Board therefore addressed the merits of employer's argument concerning the continued validity of *Holliday* in cases arising under the D.C. Act.

In the instant case, the administrative law judge, in his Decision and Order -- Award of Benefits dated March 18, 1992, found claimant entitled to permanent total disability benefits from December 18, 1990, "including periodic increases to which she may be entitled under the Act." Thereafter, the district director sent a letter dated April 27, 1992, to the Director outlining employer's liability for benefits. In that document, the district director made reference to the "Holiday [*sic*] Decision," noting that "claimant is not entitled to an annual cost of living adjustment until December 18, 1990, which is the date the claimant was found to be permanently and totally disabled," and that claimant would thus be entitled to cost-of-living adjustments at a rate inclusive of adjustments that occurred during the time that claimant was temporarily totally disabled, *i.e.*, from September 7, 1977, through December 18, 1991. Accordingly, the district director noted that pursuant to *Holliday*, on December 18, 1990, the compensation rate increased from $192.80 to $357.80. There is no evidence that this document was submitted to employer; however employer did pay benefits at this increased compensation rate. In June 1998, a dispute arose between employer and the district director regarding Section 10(f) adjustments. Specifically, following the issuance of the Board's decision in *Bailey*, employer, on June 15, 1998, recalculated the compensation rate without reference to the *Holliday* decision, and accordingly, began paying benefits at a diminished rate, *i.e.*, $237 per week, as opposed to $438 per week pursuant to *Holliday*, between June 15, 1998, and September 30, 1998, and then $247 per week, as opposed to $457 per week pursuant to *Holliday*, thereafter. In 1998, upon claimant's motion, the district director issued the order holding employer liable for a Section 14(f) penalty for failure to pay claimant at a rate inclusive of Section 10(f) adjustments calculated pursuant to *Holliday*, from which employer timely appealed.

In its decision in the instant case, the Board stated that, as in *Bailey*, the administrative law judge did not order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, nor did the district director issue any compensation orders concerning Section 10(f) prior to the order assessing the Section 14(f) penalty.[5] Employer may have had notice regarding *Holliday*, but there is no formal order memorializing its application prior to that at issue in this appeal. Thus, the Board properly applied *Bailey* in holding that it had jurisdiction over the district director's order in this case, as that order represented the first opportunity for employer to challenge the district director's calculation of Section 10(f) adjustments under *Holliday*.

In this regard, the Director's assertion that the appealed order is a Section 18(a) default order not subject to Board review is without merit. Section 18(a), in pertinent part, states:

> In the case of default by the employer in *the payment of compensation due under any award of compensation* for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the [district director] making the compensation order [f]or a supplementary order declaring the amount of the default.

33 U.S.C. §918(a) (emphasis added). As noted above, in the instant case there was never a formal determination by the administrative law judge or the district director ordering employer to pay compensation under the *Holliday* formula. Thus, the alleged default by the employer in this case, *i.e.*,

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[5] While it is true that the district director's calculation sheet explicitly discussed the application of *Holliday*, there is no precedent for holding that a calculation sheet is tantamount to an appealable order.

amounts due under *Holliday,* was not "compensation due under any award of compensation" pursuant to Section 18(a). Contrary to the Director's position, the supplementary order by the district director represents an original adjudication of the *Brandt/Holliday* issue which is subject to review by the Board. Moreover, the appealed order states that the claim filed by claimant was "for assessment of additional compensation pursuant to Section 14(f) of the Act." In contrast, as the Board noted in its decision in this case, *Snowden,* slip op. at 4 n.4, the subsequent order issued by the district director was a default order over which the Board has no jurisdiction.

Additionally, neither the administrative law judge nor the Board, in its prior decisions in this case, addressed the applicability of *Holliday. Snowden v. Washington Hospital Center,* BRB Nos. 92-1453/A (June 28, 1994)(unpub.), BRB No. 95-2125 (Dec. 9, 1996)(unpub). Thus, contrary to the Director's assertion, the law of the case doctrine does not apply. Moreover, the Board's decision in *Ryan,* 28 BRBS at 132, is clearly distinguishable from the instant case, as well as from *Bailey,* inasmuch as in that case there was an explicit award by the administrative law judge of annual cost of living adjustments on the award of permanent total disability compensation pursuant to Section 10(f) in accordance with *Holliday.*[6] We therefore reject the Director's contentions, first that the appealed order in the instant case is not subject to

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[6] In *Ryan,* the administrative law judge characterized employer's request to adjust claimant's benefits under *Phillips v. Marine Concrete Structures, Inc.,* 895 F.2d 1033, 23 BRBS 36(CRT)(5th Cir. 1990)(*en banc*), as a motion for modification since the prior decision applying *Holliday* was final. The administrative law judge rejected employer's motion, as Section 22 of the Act, 33 U.S.C. §922, does not apply to an issue involving a legal interpretation which is decided against a party. The Board affirmed the administrative law judge's determinations as being in accordance with law.

review by the Board, and second, that *Bailey* is distinguishable from the instant case, as they lack merit.

Similarly, we reject the Director's contention that the Board's holding in *Bailey* is erroneous. As the Board stated in *Bailey,* the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Brandt* stated, "In sum, we accept the *Holliday* ruling as the proper reading of the statute in this circuit *at least until the precedent is overruled in the Fifth Circuit,* or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." *Brandt,* 785 F.2d at 332, 18 BRBS at 78(CRT)(emphasis added). The Board thus observed that the *Brandt* court did not state that it would follow *Holliday* until the D.C. Circuit overruled it but rather until it was overruled by the Fifth Circuit. *Bailey,* 32 BRBS at 77. The Board then addressed *Phillips v. Marine Concrete Structures, Inc.,* 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), wherein the Fifth Circuit overruled its decision in *Holliday* and adopted *the new position of the Director* that there shall be no Section 10(f) adjustments for periods of temporary total disability,[7] adding that this position was the posture taken by the Board, except in

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[7] In overruling *Holliday,* the Firth Circuit in *Phillips* concluded that the language of Section 10(f) is plain and unambiguous that the annual adjustments are to be paid only to permanent total disability benefits. *Phillips,* 895 F.2d at 1035, 23 BRBS at 38(CRT). Moreover, although the court stated that resort to legislative history is unnecessary "where the statute is so lucid," it nonetheless noted that, with regard to Section 10(f), Congress intended to provide for upgrading benefits in future years in cases of permanent total disability and had rejected a version of Section 10(f) providing for annual adjustments to all compensation, whether partial or total, temporary or permanent. *Phillips,* 895 F.2d at 1035 n.3, 23 BRBS at 38 n.3(CRT). Thus, the Fifth Circuit held that claimants are not entitled to Section 10(f) annual adjustments during previous periods of temporary total disability.

cases arising in the Fifth and D.C. Circuits. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38(CRT); *see, e.g., Scott v. Lockheed Shipbuilding & Const. Co.*, 18 BRBS 246 (1986).

In *Bailey*, the Board therefore concluded that as *Holliday* has been overruled by the Fifth Circuit, the condition precedent set by the D.C. Circuit has been satisfied, and thus *Holliday* no longer applies to cases arising under the D.C. Act. It is indisputable that the D.C. Circuit, in *Brandt*, elected to follow *Holliday "at least until the precedent is overruled in the Fifth Circuit,"* and that said precedent was overruled by the Fifth Circuit in *Phillips*. Second, the court in *Brandt* stated that it was reluctant to reject *Holliday* and therefore create a split in the circuits. *Id.*, 785 F.2d at 332, 18 BRBS at 77(CRT). A continued application of *Holliday* in the D.C. Circuit subsequent to *Phillips* would perpetuate such a split in the circuits, particularly given that the United States Courts of Appeals for the Second and Ninth Circuits have subsequently adopted the holding in *Phillips*.[8] *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT)(9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT)(2d Cir. 1990). Moreover, the Director's litigating position in *Brandt*,[9]

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[8] The Eleventh Circuit still adheres to *Holliday*. In *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the court stated it is bound by all decisions issued by the Fifth Circuit prior to October 1, 1981, when the Eleventh Circuit was created, unless the Eleventh Circuit, in an *en banc* decision, overrules the precedent. The Eleventh Circuit subsequently reaffirmed this position, and declined to grant rehearing *en banc* on this issue. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT), *reh'g en banc denied*, 132 F.3d 48 (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

[9] In *Brandt*, the Director argued that the holding of *Holliday* is contrary to law, and urged the D.C. Circuit to accept the application ultimately adopted by the Fifth Circuit in *Phillips*. In fact, the record in that case contained documentation indicating that prior to *Phillips*, the Director intended to challenge the applicability of *Holliday* in cases arising in all but the Fifth Circuit.

Phillips, Bowen and *Lozada* clearly indicates the Director's intent "to apply this current interpretation [*i.e.*, that *Holliday* is contrary to law and thus, that annual adjustments are to be paid only to permanent total disability benefits] evenhandedly to all similarly disabled claimants in all circuits," *Brandt,* 785 F.2d at 332, 18 BRBS at 78 (CRT), and thus, the second condition precedent set by the D.C. Circuit in *Brandt* has been met. The Director is in a poor position to argue now that the *Holliday* decision should be followed. Thus, we reaffirm the Board's decision that *Holliday* is no longer to be followed in cases arising under the D.C. Act.

Lastly, we address claimant's contention that the holding in *Bailey* should not be retroactively applied in this case. The Fifth Circuit, in *Phillips*, discussed this issue. After noting the general rule that judicial decisions are given retroactive effect, *Salem v. Stumes,* 465 U.S. 638, 642 (1984), the Fifth Circuit set out the test, enunciated by the Supreme Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), that must be met before a new decision can be applied nonretroactively.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... Second, ... 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'.... Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'

Phillips, 895 F.2d at 1036, 23 BRBS at 39(CRT), citing *Chevron,* 404 U.S. at 106-07 (citations omitted). The Fifth Circuit then held that claimant met the first part of the test, that the verdict on the second inquiry is neutral, but that claimant could not show the requisite "injustice or hardship," particularly in view of the District's promise not to seek disgorgement of past benefits. *Phillips,* 895 F.2d at 1036, 23 BRBS at 39(CRT). The Fifth Circuit therefore concluded that Phillips did not meet his burden, under *Chevron,* of entitlement to an exception to the presumption of retroactivity. The Fifth Circuit concluded that "future payments may be adjusted to the amount that would have been calculated absent the *Holliday* formula although no refund of past excess payments made pursuant to *Holliday* shall be required." *Id.*

In the instant case, the Board did not establish a new principle of law; rather it followed the precedent set in *Bailey,* which did establish a new principle of law regarding the applicability of *Holliday* to D.C. Act cases. Consequently, claimant, in the instant case, has not met the first prong of the *Chevron* test and thus, has not established entitlement to an exception to the presumption of retroactivity. In keeping with *Phillips,* however we hold that payments subsequent to the issuance of *Bailey,* may be adjusted to the amount that would have been calculated absent the *Holliday* formula, as employer has done in this case commencing with its payment on June 15, 1998. *See Phillips,* 895 F.2d at 1036, 23 BRBS at 39(CRT).

Accordingly, claimant's and the Director's motions for reconsideration are denied. 20 C.F.R. §802.409. The Board's prior Decision and Order is affirmed in all respects.

SO ORDERED.

/s/ Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

APPENDIX C

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 99-0245

Not-Published

Florence Snowden Claimant-Respondent	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company (now known as Travelers Property Casualty)	)	Date Issued: November 15, 1999
Employer/Carrier-Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Party-in-Interest	)	Decision and Order

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act of Charles L. Green, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Roger S. Mackey, Chantilly, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act (No. 40-134355) of District Director Charles L. Green rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (1982)(the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973)(the D.C. Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting).

Claimant sustained a back injury while working as a psychiatric nurse for employer on September 7, 1978. On March 18, 1992, Administrative Law Judge Charles P. Rippey awarded claimant permanent total disability benefits from December 18, 1990, medical benefits, and interest, as well as any periodic increases to which claimant may be entitled under

the Act.[1] The administrative law judge's decision, however, did not set the compensation rate, and, in particular, did not order the cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), be paid in accordance with the *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT)(D.C. Cir. 1986), and *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), decisions.

Acting on claimant's claim for an assessment of additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f), the district director, by Order dated October 16, 1998, formally set out, for the first time, a determination that the compensation rate is to include annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[2] He therefore concluded, based on his finding that employer was not making disability payments at the proper rate, that employer was in default in the

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[1] The administrative law judge also granted employer's request for Section 8(f) relief, 33 U.S.C. §908(f). The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's Section 8(f) determination, and employer cross-appealed the administrative law judge's award of permanent total disability benefits. In its decision dated June 28, 1994, the Board affirmed the award of permanent total disability benefits, vacated the finding that employer is entitled to Section 8(f) relief, and remanded for further consideration of that issue in accordance with the Administrative Procedure Act. *Snowden v. Washington Hospital Center*, BRB Nos. 92-1453/A (June 28, 1994)(unpub.). On remand, the administrative law judge denied employer's request for Section 8(f) relief. The administrative law judge's denial of Section 8(f) relief was affirmed by the Board in a decision dated December 9, 1996. *Snowden v. Washington Hospital Center*, BRB No. 95-2125 (Dec. 9, 1996)(unpub.).

[2] In *Holliday*, the United States Court of Appeals for the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747.

compensation owed claimant in the amount of $3,580.68. In addition, the district director held employer liable for a penalty of 20 percent of the amount in default ($716.14) pursuant to Section 14(f).[3]

Employer appeals, contending that, pursuant to the Board's decision in *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), the holdings in *Brandt* and *Holliday* are no longer controlling authority in cases arising under the D.C. Act. Neither claimant nor the Director has filed a response brief.

In *Bailey*, 32 BRBS at 76, the Board addressed the very issue raised by employer in the instant case. Initially, the Board held that as the administrative law judge did not specifically order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, and the district director did not issue any compensation orders concerning Section 10(f) prior to the assessment of the Section 14(f) penalty, employer's appeal represented the earliest opportunity for employer to challenge the Section 10(f) calculation. *Bailey*, 32 BRBS at 76. The Board further noted that no party challenged the propriety of employer's appeal, which involved strictly a legal issue. Accordingly, the Board determined that it had jurisdiction to consider employer's appeal. The Board then held, after a review of the relevant case law issued since *Holliday*, that the district director erroneously ordered employer to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday*, as that decision no longer stands as valid precedent.

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[3] Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due; if it is not timely paid employer is liable for an assessment in the amount of 20 percent of the unpaid compensation. As the district director determined that claimant should have received $7,802.20 from employer based on *Holliday* but only received $4,221.52, a difference of $3,580.68, the district director ordered employer to pay both the deficiency and a 20 percent penalty thereof.

Bailey, 32 BRBS at 77-79. Specifically, the Board held that as the United States Courts of Appeals for the District of Columbia Circuit in *Brandt* accepted the *Holliday* ruling as the proper reading of the statute in that circuit *"at least until the precedent is overruled in the Fifth Circuit," Brandt*, 785 F.2d at 332, 18 BRBS at 78 (CRT)(emphasis added), and that inasmuch as the Fifth Circuit, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), overruled its decision in *Holliday* and adopted the new position of the Director that there shall be no Section 10(f) adjustments for periods of prior temporary total disability, *Holliday* no longer applies to cases arising under the D.C. Act. *Bailey*, 32 BRBS at 77-79.

For the reasons discussed in *Bailey*, due process requires that we decide the Section 10(f) issue raised by this appeal as this is employer's first opportunity to challenge the underlying basis for the imposition of the Section 14(f) penalty, *i.e.*, the Section 10(f) calculation pursuant to *Brandt/Holliday*. *Bailey*, 32 BRBS at 77-78. Moreover, in accordance with *Bailey*, we hold that claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she because permanently totally disabled. *Id.* at 78-79. The district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday* is therefore reversed.[4]

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[4] In the instant case, claimant subsequently applied to the district director for a supplementary compensation order, contending that although employer paid the compensation owed, it did not pay the Section 14(f) penalty. The district director investigated the claim, and thereafter issued an order declaring employer in default. As the Section 14(f) penalty has not been paid and a default order has issued, the Board lacks jurisdiction to address the propriety of the penalty. 33 U.S.C. §918(a); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS

Accordingly, the award of additional benefits in the District Director's Supplementary Compensation Order is reversed.[5]

SO ORDERED.

/s/ Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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260 (1993); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1219, 18 BRBS 60, 62-63 (CRT)(5th Cir. 1985); *Providence Washington Insurance Co. v. Director, OWCP [Kain]*, 765-F.2d 1381, 1386, 17 BRBS 135, 139(CRT)(9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT)(5th Cir. 1983).

[5] We note that the district director is not free to disregard the Board's decision in *Bailey*. *See generally Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897 (D.C. Cir. 1997)(discussing *stare decisis*).

APPENDIX D

U.S. Department of Labor

Benefits Review Board
800 K Street, NW
Washington, DC 20001-8001

BRB No. 95-2125

Not-Published

Florence Snowden Claimant	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company	)	Date Issued: December 9, 1996
Employer/Carrier- Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Respondent	)	Decision and Order

Appeal of the Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger S. Mackey (Law Offices of Conrad A. Fontaine), Fairfax, Virginia, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor, Samuel Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (88-DCW-0086) of Administrative Law Judge Charles P. Rippey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. Claimant sustained injuries to her back while working for employer. In its initial Decision and Order, the Board affirmed the administrative law judge's award of permanent total disability compensation to claimant, vacated the administrative law judge's finding that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), since that determination did not comply with the Administrative Procedure Act, and remanded

the case to the administrative law judge for reconsideration of the Section 8(f) issue. *Snowden v. Washington Hospital Center*, BRB Nos. 92-1453/A (June 28, 1994)(unpub.).

In his Supplemental Decision and Order on Remand, the administrative law judge denied employer's request for relief pursuant to Section 8(f), finding that employer failed to establish the contribution and manifest elements necessary for such relief to be granted. Employer's motion for reconsideration was subsequently denied.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 34 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability is caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT)(D.C. Cir. 1994); *Dominey v. Arco Oil and Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *see Jaffe New York Decorating*, 25 F.3d at 1085, 28 BRBS at 35 (CRT). Specifically, we agree with the Director that there is no record evidence sufficient to support a finding of Section 8(f) contribution in this case. Contrary to employer's contention, the opinion of Dr. Moskovitz, while supportive of a finding that claimant's present condition is related to a combination of her pre-existing lupus and her job injury, does not establish that claimant's total disability is not solely the result of her work injury.[1] Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, we affirm that finding and consequently his denial of Section 8(f) relief in this case. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand is affirmed.

SO ORDERED.

/s/ Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[1] Dr. Moskovitz opined "[y]es, I believe that, within a reasonable medical certainty, because she has lupus, her present level of functioning is worse than if she didn't have lupus." Depo. at 37.

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX E

U.S. Department of Labor

Benefits Review Board
800 K Street, NW
Washington, DC 20001-8001

BRB Nos. 92-1453
92-1453A

Not-Published

Florence Snowden Claimant-Respondent	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company	)	Date Issued: June 28, 1994
Employer/Carrier-Respondents Cross-Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Petitioner Cross-Respondent	)	Decision and Order

Appeal of the Decision and Order -- Award of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger S. Mackey (Law Offices of Conrad A. Fontaine), Fairfax, Virginia, for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer cross-appeals the Decision and Order -- Award of Benefits (88-DCW-0086) of Administrative Law Judge Charles P. Rippey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 (1982) *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501 *et. seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 7, 1978, claimant injured her lower back while lifting a patient during the course of her employment for employer as a psychiatric nurse. After receiving conservative treatment, claimant returned to work for employer in early 1979. Claimant continued to work until May 1979, at which time she injured her calf muscle and her back began hurting

worse than it had previously. Claimant again returned to work although her back condition continued to wax and wane. In November 1987, claimant's back conditioned worsened, and she ultimately underwent a laminectomy and spinal fusion. Shortly thereafter, she underwent additional surgery to alleviate compression of her spinal nerves caused by cauda equina syndrome. A second laminectomy and spinal fusion were performed in May 1989. In December 1991, claimant's treating physician, Dr. Moskovitz, diagnosed a herniated disc at L5/S1, and pseudarthrosis. Employer voluntarily paid claimant temporary total disability compensation from 1988 until the time of the hearing. 33 U.S.C. §908(b). Claimant sought permanent total disability compensation commencing December 1990. *See* 33 U.S.C. §908(a).

The administrative law judge found that it was undisputed that claimant was unable to return to her prior work for employer as a psychiatric nurse. The administrative law judge further determined that claimant was entitled to permanent total disability compensation commencing December 18, 1990, inasmuch as employer had not met its burden of establishing suitable alternate employment based on the four home-bound positions identified by its vocational expert, Kathleen Sampeck. Finally, the administrative law judge awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Director challenges the award of Section 8(f) relief, arguing that the administrative law judge failed to explicitly identify, discuss, and weigh the relevant evidence in violation of the Administrative Procedure Act, 5 U.S.C. §557(c). Employer responds, urging affirmance. Employer cross-appeals the award of permanent total disability compensation. Claimant has not responded to this appeal.

Employer's argument that the administrative law judge erred in awarding claimant permanent total disability

compensation is rejected. To establish a *prima facie* case of total disability, claimant must show that she cannot return to her regular or usual employment due to a work-related injury. If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See generally Director, OWCP v. Berktresser,* 921 F.2d 306, 311-312, 24 BRBS 69, 73 (CRT)(D.C. Cir. 1990); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140, 145 (1992): *see also Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988).

Initially, we reject employer's contention that in awarding claimant benefits for permanent total disability, the administrative law judge misconstrued Dr. Moskovitz's opinion as indicating that claimant was not capable of any employment. In his Decision and Order, the administrative law judge correctly noted that although Dr. Moskovitz initially expressed the opinion that claimant was not employable, he subsequently indicated that claimant was capable of working at home on a flexible schedule. Decision and Order at 3. Moreover, we note that the administrative law judge's consideration of suitable alternate employment was clearly premised on the assumption that claimant was capable of home-bound employment.

We also find no merit to employer's argument that the administrative law judge erred in finding that the jobs identified by its vocational expert, Ms. Sampeck, were not sufficient to meet employer's burden of establishing the availability of suitable alternate employment. After initially interviewing claimant in December 1990 and considering the home-bound employment restriction described in both Dr. Moskovitz's

January 8, 1992, deposition and the January 4, 1992, opinion of Dr. Gordon, Ms. Sampeck conducted a labor market survey on January 21, 1990. As a result of this survey, Ms. Sampeck identified four opportunities for homebound work which she considered suitable for claimant. The jobs identified included an appointment-setter position with Northwestern Mutual Insurance Company in Arlington, Virginia, a telemarketer position with United Business Machines in Lorton, Virginia, a telecom representative position with One Stop Financial in Damascus, Maryland, and a telemarketer position with Fiber Clean, a rug cleaning service located in Rockville, Maryland.

After considering employer's vocational evidence, the administrative law judge found that the position identified with Northwestern Mutual Insurance Company was not realistically available to someone with claimant's limitations. In so concluding, the administrative law judge credited claimant's testimony that when she attempted to follow up on this job lead by phoning Northwestern, she was informed that they did not have anything for anyone to do at home. Although Ms. Sampeck attempted to explain this occurrence by testifying that the work actually would have been with an agent named Robertson, with whom she was personally acquainted, and not with Northwestern, the administrative law judge found that this discrepancy cast doubt on Ms. Sampeck's credibility. The administrative law judge further determined that the fact that the job had not been identified until the day prior to the hearing gave it the "feel of a hurried muster to do something before trial." *See* Decision and Order at 3. Finally, the administrative law judge concluded that this job was truly sheltered employment and also discredited this position based on the fact that the requirements of the job had not been presented to Dr. Moskovitz.

The administrative law judge similarly found that the telemarketer position identified with United Business Machines

of Lorton was not realistically available to someone with claimant's limitations. This finding was based on claimant's testimony that when she called to inquire about this job, she was told that the work must be done in the office, and that there was no work available for people to perform at home.

The administrative law judge also found that the job with One Stop Financial of Damascus, Maryland, soliciting customers for AT&T long distance services would not suffice. Crediting claimant's testimony that when she attempted to call this company she was unable to obtain a telephone number either in the phone book or from directory assistance, the administrative law judge in essence found that employer had not established the availability of this job. Finally, the administrative law judge found that as the job identified with Fiber Clean setting up appointments for carpet cleaning services required a training period of at least two weeks in Rockville, which would be precluded by claimant's physical condition, this job was not reasonably available to claimant.

After careful review of the record, we affirm the administrative law judge's finding that employer did not meet its burden of establishing the availability of suitable alternate employment, because it is rational and supported by substantial evidence. *See Caudill v. Sea Tac Alaska Shipbuilding Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. See Tac Alaska Shipbuilding, Inc. v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993). Employer argues that the administrative law judge erred in finding that the job identified with Northwestern was sheltered employment. We hold that any error the administrative law judge may have made in this regard is harmless inasmuch as the administrative law judge, in rejecting this position, also relied on the fact that Ms. Sampeck, who identified Northwestern initially as the employer subsequently changed her testimony, the fact that when claimant called Northwestern she was informed that they had no home-bound

work available, and the fact that the job was not identified until the day prior to the hearing.

Employer's argument that the administrative law judge erred in rejecting the job at United Business Machines based on claimant's testimony that the company had informed her that no home-bound work was available similarly must fail. Although employer asserts that this was error because the fact that the work was not available when claimant called and inquired does not necessarily mean that the work was not available at the time it was identified, we disagree. In the present case, we hold that the administrative law judge reasonably inferred from claimant's testimony that inasmuch as United Business Machines did not offer home-bound work, this job was not realistically available to claimant given her physical limitations.

Finally, we reject employer's argument that none of the positions identified was beyond claimant's physical restrictions. We note that since neither Northwestern nor United Business Machines offered home-bound work, these jobs are not suitable for claimant as a matter of law. We further note that the administrative law judge reasonably viewed the Fiber Clean position as not suitable for claimant based on the fact that it required a two week training period outside of the home which claimant was incapable of performing. As employer has failed to raise any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, the award of permanent total disability compensation is affirmed. *See Uglesich v. Stevedoring Services of America,* 24 BRBS 180, 183 (1991).

We now direct our attention to the Director's appeal of the administrative law judge's award of Section 8(f) relief. Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case of permanent total disability where an employee suffers from a manifest pre-existing permanent

partial disability which combines with the work injury to result in the employee's permanent total disability; the permanent total disability must not be due solely to the work injury. 33 U.S.C. §908(f); *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175 (4th Cir. 1993). In order to constitute a pre-existing permanent partial disability, the pre-existing condition must be a serious, lasting physical problem. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985). Employer bears the burden of proving that the disability was in part caused by the pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). In order to satisfy the manifest requirement, employer must have had actual knowledge of the pre-existing disability, or constructive knowledge from medical records in existence from which the condition was objectively determinable. *See generally Berkstresser*, 921 F.2d at 310-311, 24 BRBS at 71-72 (CRT).

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be upheld because he did not adequately detail the evidence upon which he relied or the reasoning he employed in making the award. In the instant case, the administrative law judge's discussion of Section 8(f) consists solely of the following:

> The claimant's injury to her back was exacerbated by her pre-existing lupus erythematosus. The medical evidence to this effect in the record is uncontradicted.

Decision and Order at 7.

Because the administrative law judge failed to identify, weigh and discuss the relevant evidence and failed to identify the evidentiary basis for his conclusions, as is required by the

Administrative Procedure Act, 5 U.S.C. §557, we vacate the award of Section 8(f) relief. On remand the administrative law judge must explicitly identify, discuss, and weigh the relevant evidence under the appropriate legal standard in accordance with the requirements of the Administrative Procedure Act. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990); *Caims v. Matson Terminals, Inc.*, 21 BRBS 252 (1980).[1]

Accordingly, the administrative law judge's Decision and Order is affirmed insofar as it relates to the award of permanent total disability compensation. The award of Section 8(f) relief contained therein, however, is vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown

JAMES F. BROWN
Administrative Appeals Judge

/s/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

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[1] By Order dated April 16, 1993, the Board held the Director's motion for summary reversal of the administrative law judge's award of Section 8(f), 33 U.S.C. §908(f), relief in abeyance pending the issuance of this Decision and Order. Given our decision to remand the case for reconsideration of Section 8(f) relief, the Director's motion is denied.

APPENDIX F

U.S. Department of Labor

Office of Administrative Law Judge
800 K Street, N.W.
Washington, DC 20001-8002

DATE: 3-18-92

CASE NO: 88-DCW-0086

OWCP NO: 40-134355

IN THE MATTER OF

Florence Snowden,
Claimant

v.

Washington Hospital Center,
Employer,

and

Director, Office of Workers'
Compensation Programs,
Party In Interest

Counsel:

Richard W. Galiher, Esq.
For the Claimant

Roger S. Mackey, Esq.
For the Employer

Before: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER -- AWARD OF BENEFITS

This matter arises from the claim of Shelton Carlisle under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, as amended, and the regulations promulgated thereunder and found at 20 C.F.R. Parts 701, 702 and 703.

A hearing in this matter was held in Washington, D.C. on January 22, 1992 at which the Claimant was present and all parties were represented by counsel.

The Claimant suffers from a combination of lupus erythematosus and the consequences of a back injury while employed by the Washington Hospital Center as a psychiatric nurse on September 7, 1978. The Employer is currently paying temporary total disability benefits to the Claimant, and has reimbursed all medical bills incurred to date. I find, and the parties agree, that her average weekly age, applicable to this claim, is $289.20.

The claim is for permanent total disability commencing December, 1990, the date of maximum medical improvement. The Claimant does not mention a date in that month, but the first mention of maximum medical improvement is in Dr. Frederic T. Schwartz's letter of December 18, 1990 in which he refers to having seen the Claimant, but does not mention a date.

The Employer does not contest the permanency of the Claimant's disability, but only the Claimant's assertion that it is total. The Employer does not contest the claimed date of maximum medical improvement, and has not suggested any alternate date.

I find that the Claimant has been permanently disabled since December 18, 1990.

The Employer agrees that the Claimant is not able to perform her previous work as a psychiatric nurse, but asserts that it has met its burden of demonstrating the availability of alternate work that the claimant would be capable of performing.

The Claimant has undergone a series of back surgeries. She was diagnosed with joint disease and a ruptured disc at L4/L5 and autofusion at L5/S1. Disc removal and fusion was performed at L4/L5 with edema on the spinal cord following that surgery. Another surgery was performed to alleviate the pressure. In a third surgery the disc at L5/S1 was removed and the joint fused. Subsequently a psudoarthrosis, or false joint, developed at L5/S1, allowing movement in that area which should have been fused.

The Employer agrees that the Claimant is home bound, but asserts that she could work from her home in employment utilizing only the use of her telephone.

The Claimant's treating physician, Dr. Moskovitz, has expressed the opinion that she is not employable "at all". However, when asked whether working in an appropriate chair at home using a telephone would be contraindicated, he said that if she were capable of defining her work on a trial and error basis, where she could go from supine rest to supported sedentary work, that would be an ideal goal for her. While stating that she could be employment in the home, he gave limitations suggesting that she would need to be able alternatively to stand or sit for five hours, the rest of the time she would need to lie down. He stated he would want to review this last limitation with any rehabilitation worker who might be working with her.

The Employer's rehabilitation specialist, Kathleen Sampeck, found four jobs that she thought would be suitable. The job she thought would be best she testified was with

Northwest Mutual Insurance Company in Arlington, Virginia. The title was Appointment setter and paid from $7.00 to $7.50 an hour. The work could be done at home at any time, either seated, reclining or standing. The hours were flexible with a maximum of three hours per day. There would be brief training required, but accommodations could be made for that as well.

In an attempt to follow up, the Claimant called Northwestern Mutual Life Insurance Company in Arlington and she testified that she was told that they did not have anything for anyone to do at home. Ms. Sampeck's report mentioning Northwestern was dated only the day before the hearing. Ms. Sampeck testified after the Claimant and said that the work would be personally for an agent named Robertson, with whom she had personally bought some insurance, and would not be for Northwestern. Therefore, personnel at Northwestern would not know anything about the job, if called.

This job is truly sheltered, and does not represent earning capacity in non-sheltered employment. Further, Ms. Sampeck loses credibility when the job turns out not to be with the employer she first named, Northwestern Mutual, but, rather, a personal arrangement with someone she personally knows. Finally, the requirements of the job were not presented to Dr. Moskovitz, so we cannot know what his opinion would be. Finally, the fact that the Employer only came up with this job opportunity in a report dated the day before the hearing, gives it the feel of a hurried muster to do "something" before trial. With evidence regarding this job opportunity, the Employer has not carried its burden of demonstrating available employment opportunities within the Claimant's capacities.

The second job mentioned by Ms. Sampeck was work as a "telemarketer" for United Business Machines of Lorton, Virginia calling customers who had purchased Canon copiers and tax machines to check on maintenance and ascertain

customer satisfaction. The Claimant testified that when she called she was told that this work must be done in the office, and that no work was available for persons to perform from their home. I found the Claimant to be an extremely credible witness, and accept her testimony on this matter. On the basis of this record, I find that this job was not available for home work.

The third job found by Ms. Sampeck was with One Stop Financial of Damascus, Maryland making calls to local businesses to offer discounts on AT&T long distance telephone services. When the Claimant tried to call One Stop Financial she could find no telephone number either in the phone book or from the assistance operator. Ms. Sampeck provided no address or phone number in her report. I find this job not reasonably available to the Claimant, and, on the basis of this record, also find that this job does not carry the Employer's burden to find suitable available employment.

The final job mentioned by Ms. Sampeck in her report was with Fiber Clean of Rockville, Maryland, and involved making calls to set up appointments to sell carpet cleaning services. When the Claimant succeeded in reaching Fiber Clean on the phone, she was told that although they had some work that could be done at home, a training period of at least two weeks in Rockville would be required before she could start calling from home. In her condition, the Claimant is not able to attend two weeks of training in Rockville, and, therefore, this is not a job that would be reasonably available to her.

The Claimant became permanently and totally disabled within the meaning of the Act on December 18, 1990.

The Claimant's injury to her back was exacerbated by her pre-existing lupus erythematosus. The medical evidence to this effect in the record is uncontradicted.

ORDER

The claim of Florence Snowden to benefits under the Act is approved. The Employer ordered to pay all periodic permanent total disability benefits to which the Claimant is entitled commencing as of December 18, 1990 and continuing for a period of 104 weeks thereafter, including periodic increases to which she may be entitled under the Act. Thereafter, the Director, is ordered to arrange for payment of such benefits from the Special Fund established under §44 of the Act. The Employer remains liable for all medical benefits to which the Claimant is entitled, even after the expiration of said 104 week period. The Employer also is liable for interest on all benefits ordered herein that have not previously been paid from the period for which any portion of such payment is due until the date of actual payment.

The interest rate shall be calculated in accordance with 28 U.S.C. 1961 which provides that interest in a civil case recovered in a United States District Court shall calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week United States Treasury bills settled immediately prior to the date of the judgment.

/s/ Charles P. Rippey

Charles P. Rippey
Administrative Law Judge
Voice Phone 202-633-0042
Fax Number 202-633-0325

Washington, D.C.

CPR:bdw

CERTIFICATE OF FILING AND SERVICE

I certify that on March 27, 1992 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Florence Snowden
Claimant
8104 Oakwood Drive, Clinton, MD 20735

Aetna Casualty & Surety Company
P.O. Box 10127
Fairfax, VA 22030
Insurance Carrier or Employer (if self-insured)

Roger S. Mackey, Esquire
12701 Fair Lakes Circle
Suite 470
Fairfax, VA 22033

A copy was also mailed by regular mail to the following:

Judge Charles P. Rippey, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20001-8002

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, DC 20211

Richard W. Galiher, Esquire
Galiher, Clarke & Galiher
5 North Adams Street
Rockville, MD 20350
Washington Hospital Center
110 Irving Street, NW
Washington, D.C. 20010

MARIA BORRERO
District Director
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX G

Government of the District of Columbia
Department of Employment Services
Labor Standards
1200 Upshur Street, N.W.
Suite 100
Washington, D.C. 20011

IN THE MATTER OF:	:	
	:	
Florence Snowden	:	Supplementary
	:	Compensation Order
	:	Awarding 20 Percent
CLAIMANT	:	Additional
		Compensation
	:	Pursuant to Section 14(f)
Washington Hospital Center	:	of the Act
	:	
	:	
EMPLOYER	:	Case File No: 40-134355
	:	
Aetna Casualty & Surety Co.	:	
	:	
	:	
INSURER		

Claim has been made by claimant's counsel in this matter for assessment of additional compensation pursuant to Section 14(f) of the Act. This claim is based on the carrier's failure to make permanent total disability payments in accordance with the Holliday Decision. It appears the claimant should have been paid in the amount of $438.00 per week from June 15, 1998 to

September 30, 1998, 15 3/7 weeks, which totals the amount of $6,757.56. Commencing October 1, 1998, there was a 4.31% cost of living increase, therefore, the claimant should have been paid at the compensation rate of $457.00 per week to the present, October 16, 1998, and continuing, 2 2/7 weeks, for a total of $1,044.64. Total amount which should have been paid to the claimant is $7,802.20.

It appears that the carrier adjusted the claimant's compensation rate to $237.00 per week as of June 15, 1998 and paid at this rate through September 30, 1998, 15 3/7 weeks, for a total of $3,656.88. As of October 1, 1998 the claimant's rate was adjusted to $247.00 to reflect the cost of living adjustment of 4.31% for a total of $564.64. It appears the total amount paid to date, October 16, 1998, is $4,221.52.

The difference in the amount which should have been paid to the claimant is $3,580.68.

This matter has been reviewed in its entirety and this office has taken the position that the carrier is in violation with the final compensation order issued on December 9, 1996.

ORDER

The employer's insurance carrier, Aetna Casualty & Surety Company, is hereby ordered to pay the claimant the sum of $3,580.68 plus the 20% penalty in the amount $716.14 for a total of $4,296.82 pursuant to the provisions of Section 14(f) of the Longshore and Harbor Workers' Compensation Act. The Form LS-208 must be filed reflecting this payment.

Given under my hand and filed at Washington, D.C. this 16th day of October 1998.

/s/ L.J. Baxter

for Charles L. Green
Associate Director

CERTIFICATE OF FILING AND SERVICE

I Certify that on October 16, 1998, the foregoing Compensation Order was filed in the Office of the District Director, 40th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representative at the last known address of each as follows:

CLAIMANT:

Florence Snowden
8104 Oakwood Drive
Clinton, Maryland 20735

COUNSEL FOR CLAIMANT:

Richard W. Galiher, Esquire
Galiher, Clarke & Galiher
401 East Jefferson Street, Suite #101
Rockville, Maryland 20850

INSURANCE CARRIER OR EMPLOYER (IF SELF-INSURED):

Aetna
c/o Travelers
P.O. Box 10892
Chantilly, Va. 20151

COUNSEL FOR EMPLOYER/CARRIER

Michael Collington, Esquire
Law Offices of Roger Mackey
14008 Park East Circle
Chantilly, Virginia 20151

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs, (LHWCA),
U.S. Department of Labor, Washington, D.C. 20210

/s/ L.J. Baxter

for Charles L. Green
Associate Director
40th Compensation District
U.S. Department of Labor
Office of Workers' Compensation
Program

It should be noted that the provisions of Section 14(f) are mandatory and self executing. Only an order by the Benefits Review Board or Court staying payment of the additional 20 percent compensation can relieve an employer/carrier from this liability. There is no discretion vested in the District Director to excuse payment of the compensation after it becomes due.

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1318 September Term, 2000

Filed: August 27, 2001
Clerk

Florence Snowden,
Petitioner

v.

Director, Office of Workers' Compensation Programs, et al.,
Respondents

BEFORE: Ginsburg, Chief Judge; Williams and Rogers, Circuit Judges

ORDER

Upon consideration of respondents' petition for rehearing filed July 27, 2001, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX I

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1318 September Term, 2000

Filed: August 27, 2001
Clerk

Florence Snowden,
Petitioner

v.

Director, Office of Workers' Compensation Programs, et al.,
Respondents

BEFORE: Ginsburg, Chief Judge; Edwards, Williams, Sentelle, Henderson,* Randolph, Rogers, Tatel and Garland,* Circuit Judges

ORDER

Upon consideration of respondents' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

---

* Circuit Judge Henderson and Circuit Judge Garland did not participate in this matter.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

33 USC §908(f)

Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury.

* * *

In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

* * *

33 USC §910(f) (as amended in 1972)

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after [October 27, 1972] shall be increased by a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined [by the Secretary of Labor] under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

33 USC §914(f)

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 of this Act and an order staying payment has been issued by the Board or court.

33 USC §918(a)

In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19 of this Act, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law.

* * *

33 USC §921(a)

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 of this Act, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

* * *

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole....

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.... Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified....

* * *

33 USC §922

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(I) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This Section does not authorize the modification of settlements.